ESTATE OF FRANCES ACRES PRIMEAUX STABLER IRON ROUBEDEAUX

IBIA 79-22 Decided October 25, 1979

Appeal from order by Administrative Law Judge Sam E. Taylor denying petition for rehearing.

Reversed and remanded.

1. Indian Probate: Divorce: Indian Custom: Generally

To establish an Indian custom divorce, it must be shown the parties were living in "tribal relations" and both the custom relied upon and specific conduct in conformity to custom must also appear. The evidence is insufficient to show Indian custom divorce where there is no evidence that Indian custom divorce was practiced by the tribe to which the marriage partners belonged, and where the conduct of the partners indicated no such practice was intended.

2. Indian Probate: Marriage: Common Law and Indian Custom Distinguished

Proof at hearing tended to show Indian marriage customs were no longer practiced by the tribe concerned, and that the parties looked only to applicable state laws to regulate their domestic affairs. Indian custom marriage is not synonymous with common-law marriage, but requires proof of Indian marriage customs and conformity in practice to those customs by persons living in "tribal relations."

3. Indian Probate: Marriage: Common Law

The evidence was insufficient to establish a common-law marriage where the parties did not hold themselves out to be married, and where one of the parties refused to publicly and openly acknowledge marriage to the other.

4. Indian Probate: Attorneys At Law: Fees

Provisions of 43 CFR 4.281 allow the Administrative Law Judge to set a reasonable attorney's fee upon a proper showing by a party in an Indian probate matter. The basis for the fee set must be made to appear of record.

APPEARANCES: Houston Bus Hill, Esq., for appellants Emmitt E. Primeaux, Press L. Primeaux, and Russell Primeaux; Geraldine Yount Miller, Esq., for appellee John R. Roubedeaux.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On February 16, 1979, the Administrative Law Judge denied a petition by appellants seeking redetermination of the heirs of their sister's (decedent's) estate. An order determining heirs issued on December 8, 1978, found that decedent was survived by a husband, appellee John R. Roubedeaux, a finding which appellants challenge on appeal. Two evidentiary hearings in this matter produced a record nearly free of conflict which establishes the following factual background.

Decedent, a member of the Ponca Tribe, died intestate at Ponca City, Oklahoma, on January 8, 1978. On January 15, 1953, decedent married Wallace M. Iron (also a Ponca member); this marriage ended in divorce on December 6, 1972. On January 28, 1969, decedent participated with John R. Roubedeaux in a civil marriage ceremony before an Oklahoma Special District Judge.

Decedent and Wallace M. Iron did not live together regularly after the first years of their marriage, and Iron was frequently absent from his wife's home and from the State until 1972. Decedent took appellee, an Otoe Indian allottee, into her house in 1963 when decedent was about 33 and appellee about 70 years old. Into the same household, located on decedent's trust lands which comprise part of the estate in probate, decedent also brought William Cries For War. The three pooled their resources to run the household.

Decedent did not publicly acknowledge her "civil marriage" to appellee, but rather actively concealed it, although some acquaintances assumed she had married the appellee. Appellee describes the circumstances of their claimed marriage as follows--"She's the one suggested it we get license, so I went ahead and got license with her." Decedent's family did not regard appellee to be decedent's husband. She used the names "Primeaux," "Iron," and "Roubedeaux" alternatively, as it suited her, up until the time she died. 1/

1/ To the telephone company, the BIA land records office, and her brothers she was Frances Primeaux; to the Goodyear store, the propane

In 1972 Wallace Iron learned about the two men at his wife's house; he initiated a divorce action in State court which ended in a decree of divorce to both husband and wife on December 6, 1972. 2/ Decedent remained at her house with appellee and William Cries for War until her death in January 1978.

Considerable testimony is devoted to the domestic customs of the Ponca and Otoe tribes. 3/ The consensus of the witnesses is that Indian custom divorce and marriage are no longer practiced by either tribe. When the old customs were practiced, however, marriage required a public proclamation of the relationship by the couple. Custom required the ceremonial giving of the bride by her family and the exchange of gifts. The testimony was less certain on the subject

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fn. 1 (continued)
company, and the BIA social worker she was Frances Iron; to Sprays Jewelry Store, the radiator repairman, the haberdasher, the car salesman (and through him, the auto insurance company), and appellee, she was Frances Roubedeaux.

2/ An offer of testimony by Wallace Iron has been submitted by appellants in support of their position that appellee could not have consummated marriage with decedent. Taking the affidavit at face value, however, it is insufficient for the purpose offered, for it fails to establish common-law marriage between Iron and decedent after their divorce.

3/ Appellants seek by affidavit to offer more evidence on this subject. The affidavits merely repeat evidence given at the hearings and are rejected for the reason they are cumulative of uncontradicted evidence of record. The Board will, however, take official notice of the constitution and bylaws of the Ponca Tribe, which provide, in pertinent part:

"Section 2.

"A) The Ponca Business Committee shall be authorized to exercise all executive, legislative, and judicial powers of the Tribe including such powers as may in the future be restored or granted to the Tribe by and [sic] laws of the United States or other authority. The Ponca Business Committee may, if it deems appropriate, establish a Tribal judicial system to which it may delegate some or all of the judicial powers of the Tribe.

"Section 3.

"This constitution and by-laws and the laws enacted by the Ponca Business Committee shall be the supreme law of the Ponca Indian Tribe and all persons subject to its jurisdiction; however, the business committee shall exercise its power consistent with the provisions of this constitution and by-laws, and federal law."

No implementing ordinances providing for a system of tribal courts or regulating domestic relations have been found or brought to the attention of the Board. It is assumed there are none.

of divorce, but there was a general agreement that during the time in issue divorce from a spouse requires the intervention of a court. 4/

Appellee concludes he was the common-law husband of the decedent. He concedes his marriage to her in 1969 was invalid, since she was still married then to Wallace Iron, but argues that after the 1972 divorce from Iron the relationship between decedent and appellee had become "a valid marriage contract." Appellants urge that the presence in decedent's house of two men, both of whom apparently enjoyed the same status, was inconsistent with the creation of a common-law marriage, especially since decedent never publicly admitted, on a regular basis, that she was married to appellee. Much is made by both sides of the use of surnames employed by decedent.

The Administrative Law Judge found arguments concerning common-law marriage were moot, and ruled the 1969 marriage ceremony between appellee and decedent could be equated to a declaration by decedent of divorce from Wallace Iron by Indian custom. Simultaneously, he held the 1969 ceremony was, under the laws of the State, a valid formal marriage. According to the Judge, since decedent had not been thereafter divorced from appellee he survived as her husband.

Appellants urge the Administrative Law Judge erred when he found appellee and decedent to be husband and wife: they contend, alternatively, that she was either still married to Wallace Iron or was single when she died.

[1] When finding decedent had divorced Iron, presumably, by the custom of the Ponca Tribe, the Administrative Law Judge apparently relied upon a theory of universal Indian custom divorce, since the witnesses agreed such practices were no longer recognized by their community. There is no basis in law for such a holding. 5/ To prove an Indian custom divorce, one must establish the specific tribal customs which permit such conduct by persons who live in "tribal relations." 6/ The customs which permit divorce by Indian custom and the facts of the case which show the necessary circumstances to demonstrate conformity in practice to the customs relied upon must be made to appear of record before there can be a finding an Indian custom divorce was accomplished. 7/ Those elements are absent from the record. On the contrary, testimony at both hearings established that the old marriage customs are no longer practiced, and, additionally, it appears the Ponca Tribe may never have recognized Indian custom divorce. The record shows unequivocally that the law of the State of

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4/ See Estate of Harold Humpy, 7 IBIA 118, 86 I.D. 213 (1979).
5/ Estate of Matthew Cook, 7 IBIA 62 (1978).
6/ Estate of Matthew Cook, supra; Estate of Henry Frank Racine, 7 IBIA 1 (1978); Estate of John Ignace, 5 IBIA 50 (1976).
7/ See Estate of Phillip Tooisgah, 4 IBIA 189, 82 I.D. 541 (1975).

Oklahoma must be applied to the conduct of the parties to resolve the issue concerning the marital status of decedent. (See 25 U.S.C. §§ 348, 372 (1976).)

Except for the civil ceremony in 1969, it does not appear decedent ever declared an intention to be married to appellee. Rather, she concealed the fact of the ceremony from everyone except appellee, just as she concealed her prior continuing marriage to Wallace Iron from appellee before the civil ceremony, and, indeed, until her divorce in 1972.

The Oklahoma courts recognize common-law marriage; they are inclined to construe facts concerning a cohabitation most liberally in order to find a marriage, if such a finding is at all possible, consistent with rationality. 8/ Generally, there needs to be found a mutual agreement to be married, between persons capable of marrying. The agreement can be implied from an open assumption of the relation and declarations by the parties that they are husband and wife. 9/ Fine distinctions concerning possible objections to the marriage will not be made, so long as it appears that both partners acted in good faith to enter into a marriage with one another. 10/ Thus, even though the parties could not have married when they began their relationship, once the obstacle to marriage is removed, they become married by application of the common law. 11/

8/ Thomas v. James, 171 P. 855 (Okla. 1918).

9/ Thomas v. Thomas, 565 P.2d 148, 150 (Okla. App. 1976); Thomas v. James, supra.

10/ In Burdine v. Burdine, 242 P.2d 148, 150 (Okla. 1952), the court, quoting from a prior decision, emphasized:

"The recent decisions of our court have been very liberal in construing marital relationship where the same was entered into in good faith. In the case of Andrews v. Hooper, supra, the court states: 'This court has always been very liberal in the construction of marriage laws, where same are entered into in good faith. Regardless of statute, common-law marriages have been upheld, marriage of persons under age have been held voidable, not void, and marriages in good faith, while under disability, have been held to ripen into legitimate relations when impediments are removed. Good faith, while not controlling, is always one of the principal elements to be considered.'"

11/ Burdine v. Burdine, supra at 242 P.2d 151, where the court opines:

"In the present case, the common-law marriage at its inception, was illegal but with the removal of the impediment the marriage became validated by the conduct of the parties and their consenting minds. This has been held to be true even though the parties did not dwell under the same roof, after removal of the impediment."

[3] On the recorded evidence here, however, a good faith effort to make the relationship between decedent and appellee a marriage cannot be found. The 1969 ceremony is not evidence of such an intention, for it was concealed by decedent for obvious reasons which make her motive for the marriage ceremony ambiguous at best. 12/ After decedent's divorce from Iron in 1972 the circumstances do not permit a finding the cohabitation described by the record ripened into marriage between decedent and appellee. A simple arrangement for the sharing of expenses is what appears to have been intended. Whatever appellee intended (it appears he thought he was married to decedent) decedent never did anything proved of record to publicly commit herself to marriage with the apparent good faith intent to be appellee's wife. 13/ The circumstances of decedent's household are succinctly summarized by appellant Emmitt Primeaux:

> He [appellee] never at any time presented himself to me as a husband, and I never have known her [decedent] to claim that she was married to him or anyone else. And she done just about what she pleased. And as much as I hate to make this statement, it's got to be brought out, that she was what we might term as a swinger right now. [14/]

Appellant's analysis of the facts is consistent with the accounts given by all witnesses and describes the conduct of decedent realistically. Decedent was, therefore, at the time of her death, a single woman. The records must be corrected to show her true marital status. Appellee is not entitled to inherit as her husband.

[4] Appellants seek to have set a reasonable fee to be paid to their attorney pursuant to 43 CFR 4.281, but submit neither a claimed amount nor a statement of justification for the fee. The Administrative Law Judge may set an allowable fee to be paid the attorney at the proceedings required on remand, based upon a proper showing of a reasonable amount due consistent with prior decisions by this Board. 15/

12/ See McKee v. State, 452 P.2d 169 (Okla. Crim. 1969), for discussion of the effect of a known impediment to marriage upon the intent of a party to enter into a common-law marriage.
13/ The same rule also frustrates the claim by Wallace Iron that he married decedent by common law after their divorce in 1972. Indeed, though such a marriage is favored (see Thomas v. Thomas, supra, to prove a good faith attempt to reestablish a marriage requires more than a showing of casual cohabitation.
14/ Transcript of Proceedings at Hearing on May 17, 1978, page 138.
15/ See Estate of William Cecil Robedeaux, 2 IBIA 33, 80 I.D. 390 (1973); Estate of John J. Akers, 1 IBIA 246, 79 I.D. 404 (1972).

Order

1. The order determining heirs dated December 8, 1978, insofar as it finds decedent to have left a surviving husband, is reversed and the record is ordered corrected to show that decedent died a single woman, without issue.

2. An appropriate order determining heirs and distributing the estate consistent with this opinion is ordered to be issued by the Administrative Law Judge.

3. That portion of the order determining heirs pertaining to claims against the estate is affirmed, except that the claim by Geraldine Yount Miller, must be denied, since appellee now has no interest in the estate.

4. An order fixing a reasonable fee for appellant's attorney under provisions of 43 CFR 4.281 may be issued, in the discretion of the Administrative Law Judge after a showing of the basis and the amount of such attorney's fee.

Franklin Arness
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Mitchell J. Sabagh
Administrative Judge